

‘The Vibe’, stamp duty and SMSFs – a reminder that details matter

- by Matthew Burgess, Director, View Legal

The AAT has affirmed a decision to impose stamp duty on a property involving an SMSF, which provides important lessons on accessing duty relief.

Generally there are stamp duty exemptions in each state for transfers between individual family members of farming properties (with some iterations for transfers involving related entities, for example in New South Wales a transfer from a company to a person can be exempt from duty).

Similarly, in some jurisdictions (such as Victoria, New South Wales, Western Australia and Tasmania) there can be duty relief where an individual member transfers a property to an SMSF.

The Vibe v Black Letter Law

As is the case with many revenue related concessions however the rules to access duty relief tend to be narrow and specific; that is the antithesis to the otherwise popular legal doctrine of 'The Vibe', as first developed in the documentary movie 'The Castle' (note: generally only lawyers refer to the film as a documentary).

The decision in the case of *ANO Property Pty Ltd v Commissioner of State Revenue (Review and Regulation)* [2022] VCAT 71 provides stark and succinct example of the above concepts.

Factual background

The factual matrix involved a self represented farmer (Osborne) who transferred a farming property to a company acting as trustee of a (fixed) property trust, who had at its sole beneficiary a further company, acting as trustee of an SMSF.

At all relevant times, Osborne was the sole director and shareholder of each trustee company and was the sole member of the SMSF.

Osbourne disputed the imposition of stamp duty on the transfer.

Decision

The tribunal upheld the assessment, relevantly confirming that:

1. The exemption for stamp duty on transfers of farming land in Victoria (as is the case in most states) is predicated on a transfer between individual family members; which did not occur here;
2. There was no ability for the Stamps Office to exercise ‘some wriggle room’ discretion (arguably an analogous concept to 'The Vibe') to give effect to the 'purpose' of the farming exemption - rather as all of the requirements of the legislation were not satisfied the concession was simply unavailable;

3. Osborne's specific argument that there had been no actual change in beneficial ownership of the property, 'at least from a layman's point of view' and that the exemption should apply, consistent with the 'spirit' or 'intent' was rejected;
4. This was because the fixed trust owned by the SMSF were at law separate legal entities and despite being controlled by Osborne, could not be a 'relative' as mandated by the stamp duty rules, which require natural persons (see *Cobden Lime Pty Ltd v Commissioner of State Revenue* [2010] VCAT 1278);
5. While some aspects of the concessions allow for situations involving related entities to access duty relief, the situation here did not fully satisfy those rules either and the tribunal confirmed it was required to make the correct decision based on the law, and not some view of the 'spirit' of the regime (see *Jayne Elise Maddison, Michael James Maddison, Ryan Matthew Maddison as trustees for Mount Morgan Trust v Commissioner of State Revenue* [2020] VCAT 612).

Invalidity of authority

The tribunal also rejected a number of other somewhat tenuous arguments raised by Osbourne to access duty relief, including a suggestion that the original assessment, signed by an officer of the State Revenue Office as delegate of the Commissioner was invalid. The argument in this regard was that the power to do so was not validly delegated to the relevant officer and the signatures were so different that 'it is irresistible ... that they have not been signed by the Commissioner'.

While perhaps not as hopeful, the argument in this regard is reminiscent of the 'fail safe' strategy promoted from time to time of denying liability to pay tax (or indeed comply with any inconvenient law) on the basis that Australia and its various laws are invalid.

Broadly the argument in this regard (as explained in *McFarlane v McFarlane* [2021] VSC 197) is as follows:

- (a) State statutes that amended reference to the 'Crown' and replaced those references with the word 'State' removed the Queen from her lawful position, without her consent.
- (b) This unlawful, unilateral, removal means that state Courts are operating illegally.
- (c) The concealment of these facts also amounts to a 'misprision of treason'.

In *McFarlane* the court was succinct in rejecting all the various arguments, confirming they were misconceived and had no basis in law, particularly with reference to the inherent equitable jurisdiction held by the court.

As to in *Osbourne*, the tribunal confirmed it was neither necessary, nor appropriate, for it to look behind the determination which formed the basis for the delegation by the Commissioner to the relevant officer who issued the stamp duty assessment.